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Sonia Chen
Indiana University School of Law

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SONIA CHEN*

INTRODUCTION

The development of U.S. immigration law[1] has largely been influenced by the tension between the plenary power doctrine and constitutional norms. Some scholars have further suggested that this tension has resulted in the creation of "phantom constitutional norms" in the context of immigration laws.[2] The plenary power doctrine "declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled."[3] Despite immense criticism of the well-established doctrine,[4] courts have continued to be highly deferential in this area of law.[5] This is not to say that courts have declined to engage in *any* substantive constitutional analysis of immigration matters.[6] Rather than address the issue directly, they have devised creative methods of incorporating constitutional norms through the interpretation of immigration statutes.[7] The result is "a less

* J.D. Candidate, 2001, Indiana University School of Law-Bloomington; B.A., Music, 1998, Vanderbilt University. I would like to thank Professor John Scanlan for his invaluable comments and suggestions in developing this Note. I would also like to thank my family for their support and encouragement.

1. The term is generally used to refer to "the body of law governing the admission and expulsion of aliens[,]" which is distinct from the "general law of aliens' rights and obligations. . ." Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

2. *Id.* at 549.

3. *Id.* at 547.

4. "This doctrine has dominated immigration law since the Court adopted it almost one hundred years ago in rejecting constitutional objections to Congress' first immigration statutes." *Id.*

5. Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 126 (1998).

6. *Id.*

7. Motomura, *supra* note 1, at 549. *See also* David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2484 (1998) (arguing that "[t]he courts have adopted a 'jurisprudence of avoidance' in addressing both congressional

coherent body of case law" governed by phantom constitutional norms that lack predictability.[8]

In this Note, I will trace how the judiciary has recognized, despite congressional attempts to maintain exclusive control over immigration law, constitutional rights in lawful permanent residents. Specifically, I will outline the effects of the 1996 congressional reforms to the Immigration and Nationality Act,[9] and on the previously recognized rights of lawful permanent residents as advanced by *Kwong Hai Chew v. Colding,*[10] *Rosenberg v. Fleuti,*[11] and *Landon v. Plasencia.*[12] In Part I, I provide a background of the Supreme Court's decisions in *Chew* and *Fleuti*, and the role of the plenary power doctrine. In Part II, I discuss the realization of these phantom constitutional norms in *Landon.*[13] In Part III, I introduce the changes to U.S. immigration law promulgated by the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[14] and I examine those sections that are applicable to the admission and expulsion of lawful permanent residents of the United States. In Part IV, I consider the implications of the post-IIRIRA Board of Immigration Appeals (BIA) decision *In re Jesus Collado-Munoz,*[15] and U.S. Court of Appeals decision *Richardson v. Reno*[16] as they relate to the constitutional rights of lawful permanent residents recognized by the Court in *Fleuti.* In Part V, I analyze the future ramifications of IIRIRA for lawful permanent residents and the judiciary's role in shaping immigration law despite the plenary power doctrine.

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control of jurisdiction in general and the constitutionality of immigration statutes in particular").

8. Morawetz, *supra* note 5, at 124.

9. Immigration and Nationality Act (INA) of 1952, ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.A.).

10. 344 U.S. 590 (1953).

11. 374 U.S. 449 (1963).

12. 459 U.S. 21 (1982).

13. *See* Motomura, *supra* note 1, at 578.

14. Defense Department Appropriations Act 1997, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.A. and 18 U.S.C.A.). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is Division C of that Act.

15. Interim Decision No. 3333, 1997 BIA LEXIS 40 (B.I.A. Dec. 18, 1997).

16. 162 F.3d 1338 (11th Cir. 1998).

I. *ROSENBERG V. FLEUTI* AND THE PLENARY POWER DOCTRINE

A. The "Entry" Question

Traditionally, the Fifth and the Fourteenth Amendments to the United States Constitution have guaranteed citizens of the United States due process of law. The Fifth Amendment protects against federal action, in that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[17] Additionally, the Fourteenth Amendment provides that "[n]o *State* shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[18] Although these procedural due process rights have been extended to aliens, as well as citizens, in civil, criminal and administrative proceedings, these rights have not been so readily applied to the right to enter the United States.[19] Again, the power to admit aliens is rooted in the plenary power doctrine, which grants Congress exclusive authority over decisions to admit or not to admit persons into the United States and the power to create immigration categories.[20]

Congress' exclusive power to define specific categories of aliens and to limit the due process right of immigrants results in an aberrational application of constitutional due process.[21] In immigration law, procedural due process claims occur primarily in deportation or exclusion hearings.[22] More specifically, differences in the degree of due process[23] afforded an alien were traditionally linked to the forum in which the decision was being adjudicated and predicated on the definition of the word "entry."[24] Depending whether

17. U.S. CONST. amend. V.

18. U.S. CONST. amend. XIV, § 1 (emphasis added).

19. Robert D. Ahlgren, *Procedural Due Process in Exclusion/Deportation*, *in* 964 PUB. L. INST. 71, 73 (1996), *available at* 1996 WL 964 PLI/Corp 71. The Supreme Court has further held that the due process clause does not prevent the federal government from adopting alienage classifications. *Mathews v. Diaz*, 426 U.S. 67, 78 (1976).

20. Ahlgren, *supra* note 19, at 73.

21. *Id.*

22. *Id.* at 74.

23. This Note is primarily focused on procedural due process, which is distinguishable from substantive due process. For a discussion of the differences between substantive and procedural due process in the immigration context, see *id.* at 73.

24. *Id.* at 75. *See also* Maureen O'Sullivan, *The Cancellation of Deportation and Exclusion Jurisprudence: What Can We Expect from Removal Proceedings?*, *in* IMMIGRATION AND NATIONALITY LAW HANDBOOK–ADVANCED, *reprinted in* IMMIGRATION LAW–BASICS AND MORE, SD61 A.L.I.-A.B.A.

there was an "entry" pursuant to INA § 101(a)(13), the alien would be placed in either a deportation hearing or an exclusion hearing. Aliens who had "entered" the United States were entitled to deportation hearings, which gave them more procedural protection than the exclusion hearings gave to those who had not "entered."

This distinction between types of entry and degrees of due process granted dates back to an early Japanese immigrant case, *Yamataya v. Fisher.*[25] In *Yamataya,* the Court recognized that deportation procedures must conform to the constitutional demands of the due process clause.[26] Nevertheless, Yamataya's deportation was upheld based on the fact that she was never formally inspected upon arrival, and thus, had not effectively "entered" the United States.[27] The Court further suggested a lower standard of due process for those alleged to be present illegally in the United States.[28] The most significant difference between the two forums was in the allocation of the burden of proof. In a deportation hearing, the burden of proof was on the Immigration and Naturalization Service (INS) to prove deportability; in an exclusion hearing, the burden was placed on the alien who faces exclusion to prove admissibility.[29]

Perhaps the most confusing aspect of the entry concept was its applicability to returning aliens. Was an alien considered "entering" only on his or her first entry, or did an alien "enter" on each return trip to the United States? In *United States ex rel. Volpe v. Smith,*[30] the Supreme Court established the "re-entry doctrine." Under the Court's restrictive view, "the word 'entry' . . . includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one."[31] Often, this judicial definition resulted in harsh consequences for lawfully

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253, 255 (1999) (Under the 1996 reforms, Congress has replaced the term "entry" with "admission," shifting the focus to the definition of "admission."); Michael D. Patrick, *The Diminution of the 'Fleuti' Doctrine,* 219 N.Y.L.J. 54, Mar. 23, 1998, at 3. *See also* discussion *infra* Part III (introducing the changes to immigration law through the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)).

25. 189 U.S. 86 (1903) ("The Japanese Immigrant Case").

26. *Id.* at 101.

27. *Id.*

28. *Id.*

29. Patrick, *supra* note 24, at 3. Furthermore, "[a]n alien subject to exclusion looses [sic] a great deal of rights with regard to parole, bonding and relief from extended detention." Ahlgren, *supra* note 19, at 76.

30. 289 U.S. 422 (1933).

31. *Id.* at 425.

admitted residents returning from brief trips. As a result, twenty years later, the Court again analyzed the issue of returning resident aliens in *Kwong Hai Chew v. Colding*.[32] This time, however, the Court recognized a heightened level of protection for these individuals. *Chew* represented a shift from the earlier, more rigid rule. Following this decision, *Rosenberg v. Fleuti,* which allegedly reconfirmed the *Chew* Court's recognition of due process rights for returning resident aliens, tested the outer limits of the Court's earlier holding.

B. Kwong Hai Chew v. Colding *and* Rosenberg v. Fleuti: *The Recognition of Rights in Lawful Permanent Residents*

1. Kwong Hai Chew v. Colding

Chew, a Chinese national, was a lawful permanent resident of the United States.[33] He was returning from a voyage as a seaman on an American vessel when he was detained on board by an order of the Attorney General.[34] The voyage had included several scheduled calls at foreign ports in the Far East.[35] Upon arrival in New York, Chew was deemed excludable on the basis of confidential information, the disclosure of which would be "prejudicial to the public interest."[36] Furthermore, because he was considered an alien seeking "entry," he was detained without a hearing, without an opportunity to speak on his own behalf, and without notice of the charges brought against him.[37] Prior to his detainment, Chew was a resident of New York for five years and was characterized as "having proved good moral character."[38] Recognizing the harsh effects of the rule set by *Volpe,* the Court reasoned that, although the regulations permitted the exclusion of an arriving alien without a hearing, Chew's status as a permanent resident alien had not changed by virtue of his departure to sea.[39] Thus, the regulation was inapplicable, and Chew was still entitled to the protections of the Fifth Amendment.[40] To avoid confronting the

32. 344 U.S. 590 (1953).
33. *Id.* at 592.
34. *Id.*
35. *Id.* at 594.
36. *Id.* at 595.
37. *Id.*
38. *Id.* at 592.
39. *Id.* at 600.
40. *Id.* at 599.

constitutional issue directly, thereby challenging Congress' plenary power, the Court disguised its decision as a regulatory interpretation.

2. Rosenberg v. Fleuti

Ten years later, the Supreme Court would take the next logical step in the recognition of due process rights for permanent resident aliens. This time, the Court addressed the constitutional issue directly.

> Any doubts that *Chew* recognized constitutional rights in the resident alien returning from a brief trip abroad were dispelled by *Rosenberg v. Fleuti*, where [the Court] described *Chew* as holding 'that the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him.'[41]

Thus, *Fleuti* was a landmark decision not only because it represented a shift from the earlier, more rigid rule of "entry," but also because it was "one milestone in the transition from phantom to real of a norm recognizing a returning resident alien's stake."[42] Up to this point, courts reached results favorable to aliens, not by using constitutional norms,[43] but "by interpreting statutes, regulations, or other forms of subconstitutional immigration law."[44] Likewise, the Court in *Fleuti* used statutory interpretation to redefine "entry" to avoid the application of the term to a permanent resident who had returned to the United States from a temporary absence.[45] Instead of confronting the constitutional issue, the Court again used a phantom constitutional norm to recognize procedural due process rights for the alien. This time, however,

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41. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 820 (4th ed. 1998).

42. Motomura, *supra* note 1, at 576.

43. Hiroshi Motomura notes two ways in which constitutional norms manifest themselves:

> First, they govern expressly constitutional decisions; this is the intuitive definition of 'constitutional.' Second, in a less intuitive but equally correct use of the term, 'constitutional' norms provide the background context that informs our interpretation of statutes and other subconstitutional texts. This second use of constitutional norms explains and reflects the time-honored canon that courts ought to interpret statutes so as to avoid constitutional doubts.

Id. at 548-49.

44. *Id.* at 560.

45. *Id.* at 577.

"the phantom norm of procedural due process for returning permanent residents was close enough to the constitutional horizon that it is unsurprising that the Court adopted it as a guide to statutory interpretation."[46]

Fleuti, a Swiss national, was originally admitted to the United States for permanent residence in 1952.[47] In August 1956, Fleuti left the United States to visit Ensenada, Mexico for a couple of hours.[48] In April 1959, almost three years after his return to the United States, the INS sought to deport him on the ground that "he had been excludable at the time of his 1956 return as an alien 'afflicted with psychopathic personality'" because he was allegedly homosexual.[49] Fleuti argued that the statute was unconstitutionally vague and ambiguous as applied to his case because "homosexuality was not sufficiently encompassed within the term 'psychopathic personality.'"[50] Thus, homosexuality could not be a ground for Fleuti's exclusion. The Court, uncomfortable with the idea of determining the constitutionality of INA § 212(a)(4), focused its attention on the statutory definition of "entry."[51]

Prior to the 1996 amendments, "entry" was defined as:

> any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure . . . was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary . . . .[52]

The question in *Fleuti* was whether Fleuti's short visit to Mexico was a

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46. *Id.*
47. Rosenberg v. Fleuti, 374 U.S. 449, 450 (1963).
48. *Id.*
49. *Id.* at 450-51.
50. *Id.* at 451.
51. *Id.* at 451-52.
52. *Id.* at 452 (quoting Immigration and Nationality Act (INA) of 1952, §101(a)(13), 66 Stat. 167, 8 U.S.C.A. § 1101(a)(13) (1952), *amended by* 8 U.S.C.A. § 1101(a)(13) (West 1998)).

departure that was "not intended" within the meaning of the "entry" exception.[53] If the 1956 return was not an "entry," then Fleuti would not be excludable, because "psychopathic personalities" were not a cause for exclusion at the time of his entry in 1952.[54] On the contrary, if his 1956 return was an "entry," Fleuti could be excludable if the Court determined that the statute was not unconstitutionally vague and ambiguous.[55] Using the developments in case law leading up to the 1952 amendment of INA § 101(a)(13) and the legislative history accompanying the revisions, the Court reasoned that Congress intended to exclude returns from brief trips from the new definition of "entry." The Court held that "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return."[56]

The *Fleuti* Court further established a three part test to determine whether the alien's departure was "innocent, casual, and brief" consistent with congressional intent in formulating this "entry" exception. First, the Court looked at the length of Fleuti's absence.[57] Second, the Court looked at the purpose of his visit.[58] Finally, the Court indicated that procuring travel documents was relevant to whether Fleuti's trip was meaningfully interruptive of his status as a permanent resident.[59] Using these three factors, the Court reached the conclusion that Fleuti's short visit to Mexico was "innocent, casual, and brief" within the "entry" exception. Thus, he was not excludable at the time of his 1956 return to the United States.

C. The Transition to Constitutional Norms in Immigration Law

Was the Court's construction of "entry" in *Fleuti* routine statutory interpretation, or was something else motivating the Court? Hiroshi Motomura suggests that the majority's opinion was largely motivated by

53. *Id.* at 452-53.
54. *Id.* at 453 n.2.
55. *Id.*
56. *Id.* at 462.
57. *Id.*
58. *Id.*
59. *Id.*

sympathy for the view that current immigration law failed to recognize that the "interests at stake" were "momentous"[60] for the resident alien.[61] Though hidden under the guise of statutory analysis, this sympathy was in fact the impetus for much of the Court's analysis. The majority was quick to conclude that Congress' purpose in codifying the definition of "entry" was to ameliorate the harsh effects of the previous rule[62] and that Congress could not have intended to exclude lawful permanent resident aliens upon return from a departure of a "couple of hours."[63] Contrary to what the Court would espouse as clear Congressional intent, however, the views expressed by Congress were far from being clear.

First, the *Fleuti* Court concluded that INA § 101(a)(13) was representative of Congress' rejection of the harsh results brought about by the rule articulated by the majority in *United States ex rel. Volpe v. Smith* defining "entry" as "*any* coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one."[64] Although Congress recognized the judicial precedent of the "entry" doctrine by providing for subsequent entries by a resident alien, the House and Senate Committee Reports of the Eighty-Second Congress did not recommend a broad exception for returning lawful permanent resident aliens.[65] On the contrary, the Reports specifically stated that "any coming of an alien from a foreign port or place or an outlying possession into the United States is to be considered an entry, whether voluntary or otherwise, *unless* the Attorney General is satisfied that the departure of the alien . . . was unintentional or was not voluntary."[66] The language of the Reports, however, seemed to take a secondary role to the more pressing humanitarian position embraced by the *Fleuti* Court.

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60. *Fleuti*, 374 U.S. at 458 (quoting Di Pasquale v. Karnuth, 158 F.2d 878, 879 (2nd Cir. 1947) and Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)).

61. Motomura, *supra* note 1, at 577.

62. *Fleuti*, 374 U.S. at 457-58.

63. *Id.* at 461.

64. *Volpe*, 289 U.S. at 425 (emphasis added).

65. *Fleuti*, 374 U.S. at 457 n.8 (quoting H.R. REP. NO. 82-1365, at 32 (1952); S. REP. NO. 82-1137, at 4 (1952)).

66. *Id.* (emphasis added).

Second, referring to *Di Pasquale v. Karnuth*[67] and *Delgadillo v. Carmichael*,[68] the *Fleuti* Court noted that it should be guided by the more general principles announced in the two decisions when determining the breadth of the exceptions.[69] These cases establish that lawful permanent resident aliens have a "vested interest" in their residence and that "the continued enjoyment of [our] hospitality once granted, shall not be subject to meaningless and irrational hazards."[70] The Court in *Delgadillo* further concluded that it could not have been Congress' intent to subject aliens whose "stakes are indeed high and momentous" to such "fortuitous and capricious" standards.[71] However, the Court in *Fleuti* failed to acknowledge that these two cases applied the law established in *Volpe v. Smith* and specifically distinguished them on the grounds that "those were cases where the alien plainly expected or planned to enter a foreign port or place," whereas in *Di Pasquale* and *Delgadillo*, neither alien had a part in "selecting the foreign port as his destination."[72] Nevertheless, again emphasizing the harshness of the consequences, the Court construed the "entry" exception to include Fleuti.[73]

It is evident that the Court in *Fleuti* had to ignore clear legislative intent to reach a more favorable "subconstitutional outcome."[74] Some scholars would argue that this method of using phantom norms to reach subconstitutional standards in immigration law is advantageous. As David Cole argues, the Court has adopted a very deferential review because Congress finds solid support in the Constitution for its authority in immigration matters.[75] Through these favorable "subconstitutional outcomes," however, the Court has been able to impose "some limits on these otherwise plenary powers, without directly challenging Congress."[76] The Court has also

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67. Di Pasquale v. Karnuth, 158 F.2d 878 (2d Cir. 1947).

68. Delgadillo v. Carmichael, 332 U.S. 388 (1947).

69. *Fleuti*, 374 U.S. at 458-59.

70. *Di Pasquale*, 158 F.2d at 879.

71. *Delgadillo*, 332 U.S. at 391.

72. *Id.* at 390. This was also one of the arguments articulated by the dissent in *Fleuti*. *See Fleuti*, 374 U.S. at 465-68.

73. Motomura notes that Congress most likely intended the term "entry" to cover Fleuti's return based on the limited number of exceptions granted and Congressional rejections to the specific amendments that would have covered Fleuti. Motomura, *supra* note 1, at 578.

74. *Id.* at 577.

75. Cole, *supra* note 7, at 2508. The Court has only held two immigration statutes unconstitutional, and invalidated two jurisdictional statutes for intruding on the judicial power. *Id.*

76. *Id.* at 2509.

created an opportunity for dialogue between the Court and Congress, while preserving congressional authority as the Court's implicit legitimation as a result of Congress' silence on certain matters.[77] This is what Cole refers to as the "strength of the 'jurisprudence of avoidance.'"[78] Through statutory interpretation or subconstitutional standards, the Court ensures aliens some rights without directly challenging Congress' plenary powers.[79] Judicial decisions also facilitate discussions between Congress and the Court.[80] When the Court adopts a statutory construction to avoid constitutional problems, it is advising Congress that "we don't believe you intended to do this, because if you did it would raise grave constitutional questions."[81] This leaves Congress the option of redrafting the legislation to restate its intent more clearly (bearing in mind the constitutional problems), or leaving the statute to be interpreted by the courts.[82]

II. *LANDON V. PLASENCIA*

Following the decision in *Fleuti,* cases began to arise where certain permanent residents with "high stakes" were still rendered excludable and denied procedural due process.[83] Displeased with this somewhat incomplete solution, the Court decided again to analyze the "entry" doctrine, not using phantom constitutional norms, but by deciding the constitutionality of limiting the due process rights of permanent resident aliens.[84]

In *Landon v. Plasencia,* the Court held that a permanent resident alien was entitled to "invoke the Due Process Clause on returning to this country."[85] In using the rationale of previous cases, the Court acknowledged that "once an alien gains admission to our country and begins to develop the ties that go

77. *See id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* Cole also indicates some disadvantages to the "jurisprudence of avoidance" and notes that whether it is justified depends on a balancing test, weighing the benefits and costs in particular settings. *See id.* at 2510. *See also* Motomura, *supra* note 1, at 600-13 (discussing the problems associated with subconstitutional solutions while also recognizing its usefulness as a testing ground).
83. Motomura, *supra* note 1, at 578.
84. *Id.*
85. 459 U.S. 21, 32.

with permanent residence, his constitutional status changes accordingly."[86] Thus, for the first time, permanent resident aliens found concrete support for their due process claims not only in deportation hearings, but also in exclusion hearings.[87]

Maria Antoineta Plasencia, a citizen of El Salvador, entered the United States in 1970 as a permanent resident alien.[88] Upon returning from Tijuana, Mexico, on the evening of June 29, 1975, she and her husband, a United States citizen, were detained at the border for aiding in the transportation of illegal aliens into the United States.[89] At the exclusion hearing held the next day, the immigration judge found that Plasencia and her husband "did 'knowingly and for gain encourage, induce, assist, abet, or aid nonresident aliens' to enter or try to enter the United States in violation of law."[90] He also ruled that the trip was a "'meaningful departure' from the United States and that her return to this country was therefore an 'entry' within the meaning of [INA] § 101(a)(13)."[91] Thus, she was excludable.[92]

On appeal, the *Landon* Court ruled that the INS properly proceeded in an exclusion hearing to determine the entry issue and whether Plasencia was excludable.[93] The Court stated that: "The proceeding before that officer, the exclusion hearing, is by statute 'the sole and exclusive procedure for determining admissibility of a person to the United States . . . .'"[94] Further, the Court held that Plasencia's return was an "entry" within the meaning of the statute and thus subject to exclusion.[95] Unlike Fleuti's departure, Plasencia's was "meaningfully interruptive" because the purpose of her trip was to accomplish an objective that was itself contrary to some policy reflected in the immigration laws.[96]

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86. *Id.* (citing Johnson v. Eisentrager, 339 U.S. 763, 770 (1950)).

87. Michelle Slayton, Comment, *Interim Decision No. 3333: The Brief, Casual, and Innocent Conundrum*, 33 NEW ENG. L. REV. 1029, 1036 (1999).

88. *Landon*, 459 U.S. at 23.

89. *Id.*

90. *Id.* at 24.

91. *Id.*

92. *Id.* at 25.

93. *Id.* at 28.

94. *Id.* at 27 (quoting Immigration and Nationality Act (INA) of 1952, § 236(a), 8 U.S.C.A. § 1226(a)(1952), *amended by* 8 U.S.C.A. § 1226(a) (West 1998)).

95. *Id.* at 28.

96. *Id.* at 29 (citing *Fleuti*, 374 U.S. at 462).

Despite the Court's determination that Plasencia was not entitled to a deportation hearing, it nevertheless held that, under the circumstances, she was entitled to due process. Referring to the holdings in *Chew* and *Fleuti,* the Court noted that it had previously recognized due process rights for returning resident aliens.[97] It further acknowledged, however, that these rights were recognized through "phantom norms."[98] Although the rationale behind the previous decisions was one of constitutional law, the holdings were reached under the guise of statutory interpretation.[99] This time, the Court took the next logical step to transform the "phantom constitutional norms" in *Chew* and *Fleuti* into "real" constitutional norms in immigration law.[100]

III. THE ENACTMENT OF IIRIRA

Although *Landon* seemed to make real the guarantees previously articulated through phantom norms in *Chew* and *Fleuti,* returning permanent resident aliens would soon be faced with another threat to their constitutional rights. On September 30, 1996, U.S. President William J. Clinton signed IIRIRA into law.[101] Enacted to control illegal immigration, the bill was criticized as "overstep[ping] duty" and "subvert[ing] cherished American traditions . . . and the guarantee of equal rights to all."[102]

Specifically, IIRIRA made changes to immigration laws that would have significant ramifications for lawful permanent resident aliens. First, IIRIRA combined deportation and exclusion into "removal proceedings" by replacing the term "entry" with "admission." Second, the 1996 amendment rewrites INA § 101(a)(13) to list specific categories where lawful permanent residents will not be regarded as seeking admission.[103] Third, IIRIRA expanded the categories of inadmissibility under INA § 212(a), creating more stringent

97. *Id.* at 33.

98. *Id.*

99. *Id.*

100. Motomura, *supra* note 1, at 580. Although the Court concluded that Plasencia was entitled to due process, the exact standard was never articulated. Instead, the case was remanded to the Court of Appeals to determine whether the procedures afforded Plasencia actually comported with the due process clause. *Landon,* 459 U.S. at 37.

101. Ellen G. Yost, *Immigration and Nationality Law,* 31 INT'L LAW. 589, 589 (1997).

102. 142 CONG. REC. S11, 518 (daily ed. Sept. 27, 1996) (exhibit entered by Sen. Bob Graham including portions of the Miami-Herald).

103. Immigration and Nationality Act (INA) of 1952, § 101(a)(13)(C), 8 U.S.C.A. § 1101(a)(13)(C) (West 1998).

admission standards for aliens seeking readmission. Additionally, the definition of "aggravated felony" was expanded to prevent "undesirable" persons from entering the United States. All the while, the effect of these amendments has been harsh and, at times, inhumane. Furthermore, the forms of discretionary relief available to those with criminal records have been substantially limited. Finally, Congress has severely restricted the availability of judicial review for immigration matters. All of these factors combined considerably limit the rights of returning permanent resident aliens.

A. 'Removal Proceedings' and the New Focus on 'Admission'

Prior to IIRIRA, exclusion proceedings were governed by INA § 236 and deportation proceedings were governed by INA § 242. IIRIRA collapses both sections into INA § 240, which governs removal proceedings.[104] In general, removal proceedings are conducted by an immigration judge to determine the inadmissibility or deportability of an alien.[105] The inadmissibility of an alien is determined according to INA § 212(a), and the deportability of an alien is determined according to INA § 237(a). Although the new proceedings retain the old concepts of exclusion and deportation, the distinction between the two removal proceedings revolves around the definition of "admission" rather than "entry."[106]

"Admission" is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[107] Previously, under the "entry" doctrine, "any coming of an alien into the United States, from a foreign port or place or from an outlying possession" was considered an entry, and thus, the alien who entered was entitled to more discretionary relief and procedural due process in deportation hearings.[108] Under the 1996 revisions to the INA, the alien must undergo inspection and authorization by an immigration officer to be considered "admitted."[109] This

104. O'Sullivan, *supra* note 24, at 255.

105. Immigration and Nationality Act (INA) of 1952, § 240(a)(1), 8 U.S.C.A. 1229a (a) (1) (West 1998).

106. 8 U.S.C.A. 1101 (a) (13).

107. 8 U.S.C.A. 1101 (a) (13) (A).

108. Immigration and Nationality Act of 1952 (INA), § 101(a)(13), 66 Stat. 167, 8 U.S.C.A. § 1101(a)(13) (1952), *amended by*, 8 U.S.C.A. § 1101(a)(13) (West 1998).

109. 8 U.S.C.A. § 1101(a)(13)(A).

prevents the alien who surreptitiously enters the United States from claiming the benefits of a deportation hearing based on his physical presence in the United States, regardless of his length of residency.[110]

Regarding the burden of proof, the new standards for determining admissibility in removal proceedings are analogous to those previously established in exclusion proceedings.[111] Generally, the alien has the burden of proof.[112] However, the standard varies depending on whether the alien is an applicant for admission subject to exclusion or an admitted alien facing deportation.[113] If the alien is an applicant for admission subject to exclusion, the alien must prove that he or she is "clearly and beyond a doubt" entitled to admission and is not inadmissible under INA § 212.[114] If, however, the alien establishes by "clear and convincing" evidence that he or she is not an alien seeking admission and that there was a prior lawful admission, the alien is no longer an "applicant for admission."[115] Thus, the burden shifts to the government in cases of deportable aliens.[116] When an alien previously admitted is facing deportation, the INS has the burden of proving by "clear and convincing" evidence that the alien is deportable.[117] Again, the standard is largely dependant upon the definition of "admission," and whether the alien has been "admitted" prior to the determination of removability.

B. The Lawful Permanent Resident Alien Exception

The most ambiguous of the 1996 amendments are the exceptions for permanent resident aliens. Prior to IIRIRA, the Act defined "entry" to exclude a lawful permanent resident if "the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not

110. Patrick, *supra* note 24, at 3.
111. O'Sullivan, *supra* note 24, at 256.
112. *Id.*
113. *Id.* at 256-57.
114. Immigration and Nationality Act (INA) of 1952, § 240(c)(2)(A), 8 U.S.C.A. § 1229a(c)(2)(A) (West 1998).
115. 8 U.S.C.A. § 1229a(c)(2)(B).
116. 8 U.S.C.A. § 1229a(c)(3)(A).
117. *Id.*.

voluntary . . . ."[118] This language has been replaced by six categorical exceptions to the rule that a permanent resident alien will not be regarded as seeking admission in the United States.[119]

Although enacted to remove some of the ambiguities of the earlier entry problem, the new amendments have created their own complexities. I will discuss these complexities in Part IV of this article.

C. Additional Bars to Admissibility

IIRIRA added new bars to admissibility that have particularly strong ramifications for lawful permanent resident aliens. These modifications are "particularly wide-reaching and troublesome"[120] and reflect the anti-immigration sentiment underlying the passage of this Act.[121] Specifically, INA § 212(a) was amended to prevent a category of previously removed aliens from reentering the United States. In the 1996 amendment, Congress outlines three types of previously removed aliens who are now inadmissible under IIRIRA: certain aliens who were previously ordered removed, aliens who were unlawfully present for significant periods of time, and aliens who were unlawfully present after previous immigration violations.[122] The period of

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118. § 101(a)(13), 8 U.S.C.A. § 1101(a)(13).

119. § 101(a)(13)(C), 8 U.S.C.A. § 1101(a)(13)(C). The relevant passage reads as follows:
An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien-
(i) has abandoned or relinquished that status,
(ii) has been absent from the United States for a continuous period in excess of 180 days,
(iii) has engaged in illegal activity after having departed the United States,
(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings,
(v) has committed an offense identified in section 212(a)(2) [8 U.S.C.A. §1182(a)(2)], unless since such offense the alien has been granted relief under section 212(h) [8 U.S.C.A. §1182(h)] or 240A(a) [8 U.S.C.A. §1229b(a)], or
(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorized by an immigration officer.

120. Yost, *supra* note 101, at 593.

121. Slayton, *supra* note 87, at 1045.

122. Immigration and Nationality Act (INA) of 1952, § 212(a)(9), 8 U.S.C.A. § 1182(a)(9) (West 1998).

inadmissibility varies and depends upon the alien's status. The Act now permits the INS to exclude (1) aliens who were previously removed due to an act of misrepresentation under INA § 212(a)(6)(C) or who were previously removed for a failure to comply with documentation requirements under INS § 212(a)(7) and (2) any aliens who are at the end of removal proceedings, for a minimum period of five years, or permanently in the case of an alien convicted of an aggravated felony.[123] An alien who has been ordered removed or who departs the United States while an order of removal is outstanding, is inadmissible for a minimum of ten years.[124] Additionally, aliens who are unlawfully present[125] in the United States for a period of more than 180 days, but less than one year, and depart prior to commencement of removal proceedings, are inadmissible for three years from the date of departure or removal.[126] The period of inadmissibility increases to ten years if the alien is unlawfully present in the United States for more than one year.[127] Finally, INA § 212(a)(9)(C) excludes any aliens who are unlawfully present in the United States subsequent to a previous immigration violation.[128]

D. The New 'Aggravated Felony' Standard

Following the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),[129] aggravated felons are permanently barred from entering the United States.[130] This is particularly noteworthy given the expanded definition of "aggravated felony" in IIRIRA.[131] Enacted on the one-year anniversary of the Oklahoma City bombing,[132] "AEDPA was passed to

123. *Id.*

124. *Id.*

125. An alien is unlawfully present in the United States if the alien remains in the United States after the expiration of an authorized stay or is present in the United States without being admitted or paroled. 8 U.S.C.A. § 1182(a)(9)(B)(ii).

126. 8 U.S.C.A. § 1182(a)(9)(B)(i).

127. *Id.*

128. 8 U.S.C.A. § 1182(a)(9)(C)(i).

129. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.A.)[hereinafter AEDPA].

130. AEDPA §440(a).

131. Immigration and Nationality Act (INA) of 1952, § 101(a)(43), 8 U.S.C.A. § 1101(a)(43) (West 1998).

132. On April 19, 1995, Alfred P. Murrah Federal Building in Oklahoma City became the site of the deadliest terrorist attack in U.S. history, killing 169 men, women and children. At approximately 9:03 a.m., a truck bomb exploded in front of the building, blowing off the front side of the nine-story federal building,

'combat the force of domestic terrorism through legislation aimed at deterring and preventing senseless acts of violence.'"[133]

Not only was the definition of "aggravated felony" expanded to include new crimes,[134] but it was also modified to include any crime for which the term of imprisonment exceeds one year.[135] This lowers the previous threshold of five years.[136] Additionally, the threshold for money laundering and other illegal monetary transactions was reduced from $100,000 to $10,000, and the threshold for tax evasion and fraud was reduced from $200,000 to $10,000.[137]

Furthermore, the retroactive application of this new amendment[138] coupled with INA § 237(a)(2)(A)(iii), allowing deportation of any alien convicted of an aggravated felony after admission, subjects many unsuspecting longtime permanent resident aliens to deportation. Individuals applying for naturalization under the impression that they are eligible to become U.S. citizens are haunted by their past conviction as they are directly confronted by the retroactivity of the new law upon application, thereby rendering them deportable. As a result, this has been criticized as one of the more unfair and unnecessary aspects of the new law.[139] Imagine for example, a resident alien who arrives in 1992, prior to the enactment of IIRIRA, is later convicted of theft and sentenced to two years imprisonment, and subsequently released and establishes a lifestyle similar to that of an American citizen. On March 31, 1996, he or she would not be an aggravated felon as the definition of "aggravated felony" only includes a theft offense in which the term of imprisonment is at least five years. The next day, however, IIRIRA goes into

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collapsing floors and burying victims under masses of concrete and steel. *E.g.*, Tony Clark, *The Worst Terrorist Attack on U.S. Soil: April 19, 1995, at* http://www.cnn.com/ US/OKC /daily/ 9512/ 12-30/ index.html (Dec. 30, 1995).

133. Sara Candioto, Note, *The Anti-Terrorism and Effective Death Penalty Act of 1996: Implications Arising from the Abolition of Judicial Review of Deportation Orders*, 23 J. LEGIS. 159, 159 (1997). *See also id.* at 393-94 (discussing the events triggering the enactment of AEDPA).

134. *Id.* at 394-95. As a result, certain crimes of violence, theft, burglary, racketeering, gambling offenses, counterfeiting, document fraud, commercial bribery, forgery or trafficking in vehicles with altered identification numbers, obstruction of justice, perjury, and bribery of a witness, are all classified as an "aggravated felony" under immigration laws and *are* subject the perpetrator to permanent inadmissibility. Yost, *supra* note 101, at 594 n.50 (emphasis added).

135. Yost, *supra* note 101, at 594.

136. 8 U.S.C.A. § 1101(a)(43).

137. 8 U.S.C.A. §1101(a)(43).

138. *Id.*

139. Sara A. Martin, Note, *Postcards from the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRIRA*, 19 B.C. THIRD WORLD L.J. 683, 695 (1999).

effect and the definition of "aggravated felony" is expanded to include a theft offense resulting in at least one year of imprisonment. Suddenly, on April 1, 1997, the resident alien would be subject to deportation despite the fact that his or her crime was not an "aggravated felony" at the time it was committed.[140]

E. Limitations on Discretionary Relief

Further limitations on the availability of discretionary relief under INA § 240A deprive permanent resident aliens of vested rights and subjects them to harsh consequences.[141] The new "cancellation of deportation" combines the earlier INA § 244 "suspension of deportation" and INA § 212(c) waivers. Unlike the earlier INA § 244 "suspension of deportation," however, the new "cancellation of deportation" presents a less accommodating standard of relief. Under INA § 244, the alien who faced deportation could seek relief on the basis that deportation would result in "extreme hardship" to the alien or to a U.S. citizen or permanent resident who is the alien's spouse, parent or child.[142] Although this was a heavier burden of proof than INA § 212(c), the alien was almost never barred from seeking relief on the basis of deportable offenses. Similarly, under the then prevailing interpretation of INA § 212(c), immigration judges were allowed to exercise discretion where removal of a particular criminal alien may not have been appropriate.[143] Careful consideration was given to the individual circumstances of the alien who was facing deportation. After balancing several factors established by the BIA, the immigration judge would determine the alien's eligibility for waiver.[144] After the enactment of IIRIRA, however, aliens convicted of an aggravated felony would first have to meet the statutory eligibility requirements and the unforgiving "exceptional and extremely unusual hardship" standard to obtain relief.[145]

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140. In other words, the prohibition against *ex post facto* laws does not apply in the context of deportation statutes. ALEINIKOFF ET AL., *supra* note 41, at 718. *See also* Galvan v. Press, 347 U.S. 522, 530-31 (1954) (holding that policies pertaining to the entry of aliens and their right to remain here are entrusted exclusively to Congress, and thus, the *ex post facto* clause has no application to deportation).

141. *See* Slayton, *supra* note 87, at 1046-47.

142. Martin, *supra* note 139, at 699-700.

143. *Id.* at 699.

144. *Id.*

145. *Id.* at 701.

> While it remains unclear with what degree of severity this new standard will be enforced, its application will most likely parallel its application under the old version of the INA for serious offenses. Therefore, combining the previous [INA §§] 212(c) and 244(a) waivers into the single 'cancellation of deportation' provision establishes an egregiously high threshold.[146]

Again, this change to the Immigration and Nationality Act reflects the harshness of IIRIRA and the limiting effect on the rights of permanent resident aliens.

F. The Preclusion of Judicial Review

In the most significant of the 1996 amendments, Congress severely restricted the availability of judicial review for certain aliens who face deportation.[147] After stripping away the rights of these permanent resident aliens, AEDPA and IIRIRA then limit access to judicial review, often eliminating the aliens' only form of protection. This has been the topic of much scholarly debate as academics and lawyers await the Court's interpretation of the laws restricting federal court jurisdiction in immigration cases.

Prior to the 1996 amendments, the federal courts of appeals were granted jurisdiction over appeals from final orders of deportation.[148] Likewise, appeals for final orders of exclusion were initiated through a habeas corpus petition in district court.[149] Furthermore, if a collateral issue arose upon review of a deportation order in a federal court of appeals, federal district courts were given federal question jurisdiction, habeas corpus jurisdiction, and jurisdiction for all claims arising under the immigration laws.[150]

The 1996 enactment of AEDPA placed substantial limitations on the

146. *Id.*

147. David Cole, *No Clear Statement: An Argument for Preserving Judicial Review of Removal Decisions*, 12 GEO. IMMIGR. L.J. 427, 429 (1998).

148. *Id.* at 428.

149. *Id.*

150. *Id.* at 429.

judicial review of certain deportation orders:[151] "Any final order of deportation against an alien who is deportable by reason of [certain enumerated criminal grounds] shall not be subject to review by any court."[152] Following the trend of AEDPA, IIRIRA went even further in restricting the availability of judicial review in immigration matters. Not only are "criminal aliens" denied access to judicial review for INS removal orders, but they are also denied review for INS decisions that detain them pending removal.[153] Additionally, IIRIRA bars judicial review of all discretionary relief other than asylum.[154] Finally, the most inclusive of these new restrictions is the "catch-all" provision,[155] granting the Attorney General exclusive jurisdiction in decisions or actions regarding the commencement of proceedings, the adjudication of cases, or the execution of removal orders against any aliens.[156]

Read literally, these new provisions barring judicial review divest the federal courts of their constitutional powers and intruding on their "essential function."[157] Using the "clear statement" rule, however, the Court has interpreted these provisions to preserve some jurisdiction over immigration matters.[158] The rule demands that statutes be read to preserve judicial review of constitutional claims and of habeas corpus unless Congress expressly forecloses such review.[159] Although the issue of judicial review has resulted in an entire line of cases[160] and scholarly debate, the relevant question for my discussion of the Fleuti doctrine is to what extent the federal judiciary, in light of the 1996 changes, remains willing and able to confront the plenary powers of Congress. In Part IV, I will discuss some of the recent judicial decisions reflecting the changes made by AEDPA and IIRIRA. I will also demonstrate the instability and inconclusiveness of these court determinations. Thus, in Part V, I will conclude by discussing the future ramifications of these

151. *Id.*

152. *Id.* (quoting AEDPA §§401(e), 440(a)).

153. *Id.* at 429.

154. Immigration and Nationality Act (INA) of 1952, § 242(a)(2)(B), 8 U.S.C.A. §1252(a)(2)(B) (West 1998).

155. Slayton, *supra* note 87, at 1051.

156. 8 U.S.C.A. §1229a(a)(3).

157. Cole, *supra* note 147, at 431. Cole further argues that such a bar would be a violation of due process as well as the Suspension Clause. *Id.*

158. *Id.*

159. *Id.*

160. *See* Johnson v. Robison, 415 U.S. 361 (1974); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

congressional changes and the role of the judiciary in shaping this body of law in light of the plenary power doctrine.

IV. POST-IIRIRA DECISIONS

A. In re Jesus Collado-Munoz

Following the passage of the 1996 Act, there seemed to be conflicting sentiment as to whether the Fleuti doctrine was still applicable. In their decision in *In re Jesus Collado-Munoz,* the BIA held that Congress effectively eliminated the Fleuti doctrine when it supplanted the definition of "entry" with definitions for "admission" and "admitted."[161] The Board used the plain language of the statute, legislative history, and the rationale of *Fleuti* to support its conclusion.

Jesus Collado, a lawful permanent resident, had been in the United States for more than twenty-five years.[162] Upon returning to the United States from a two week visit to his native country, the Dominican Republic, he was charged with inadmissibility under INA § 212(a)(2), based on a 1974 conviction for sexual abuse of a minor.[163] When Collado first came to the United States in 1972, at the age of seventeen, he was involved in a sexual relationship with a girlfriend who was a minor.[164] The girlfriend's mother pressed criminal charges against Collado, who pled guilty to the crime of sexual abuse in the second degree.[165] Then, his crime was not cause for deportation.[166] Subsequently, upon his return in 1997, IIRIRA had been passed, and he was subject to its retroactivity.[167] Thus, Collado was deemed inadmissible for a single crime involving moral turpitude.[168]

The issue on appeal was whether the Fleuti doctrine survived enactment of IIRIRA, and whether Collado's departure fell within the "brief, casual, and

161. *In re* Collado-Munoz, Interim Decision No. 3333, 1997 BIA LEXIS 40 (B.I.A. Dec. 18, 1997), at *10.
162. *Id.* at *3.
163. *Id.*
164. Morawetz, *supra* note 5, at 115.
165. *Id.*
166. *Id.* at 116.
167. *Id.*
168. *Id.*

innocent" requirement of the exception.[169] If so, he would not be an alien seeking admission, and would be entitled to greater due process protection in the deportation hearing. Unfortunately, the Board rejected the application of the doctrine, and the case was remanded for further proceedings to determine Collado's excludability under INA § 212(a)(2).[170] The Board's decision was based on the plain meaning of the statute, legislative history, and the policy considerations underlying the *Fleuti* decision.[171]

First, the Board reasoned that the plain meaning of the required a finding that it was written "to create a dichotomy."[172] The six exceptions specify when a lawful permanent resident alien should be regarded as "seeking an admission" without regard to whether the alien's departure was "brief, casual, and innocent" under the Fleuti doctrine.[173] According to the Board, the statute established a general rule, always applicable unless a particular exception stated otherwise.[174] It then specified six exceptions to the general rule, and any lawful permanent resident alien fitting one of the six exceptions would be deemed to be "seeking admission."[175] Prior to IIRIRA, the concept of absences that were "brief, casual, and innocent" was incorporated into other provisions of the Act.[176] Now, INA § 240A(d) sets "special rules" for continuous residence or physical presence in the United States.[177] When Congress intended to preserve aspects of the Fleuti doctrine, it did so specifically, as reflected by the statute.

Second, the Board acknowledged that the legislative history clearly suggested that the amended definition was intended to preserve "a portion" of the Fleuti doctrine.[178] However, it also noted that "this section intends to overturn certain interpretations of Fleuti by stating that a returning lawful permanent resident alien is seeking admission if the alien is attempting to enter or has entered the United States without inspection . . . ."[179] In effect,

169. *In re Collado-Munoz*, 1997 BIA LEXIS 40, at *4.
170. *Id.* at *13.
171. *Id.* at *8-*14.
172. *Id.* at *7-*8.
173. *Id.* at *12.
174. *Id.*
175. *Id.*
176. *Id.* at *8 n.2. *See also* Immigration and Nationality Act (INA) of 1952, § 244(b)(2), 8 U.S.C.A. § 1254(b)(2) (West 1998); INA § 245A(a)(2)(B), 8 U.S.C.A. § 1255a(a)(3)(B) (West 1998).
177. *In re Collado-Munoz*, 1997 BIA LEXIS 40, at *8 n.2.
178. *Id.* at *9 n.3.
179. *Id.* at *10 n.4 (quoting H.R. Rep. No. 104-469, pt. 1 at 225-26 (1996)).

IIRIRA was enacted to restrict the Fleuti doctrine rather than to expand.[180]

Finally, the Board asserted that its decision in *Collado* was consistent with the policy considerations underlying *Fleuti*. The decision in *Fleuti* was based on an interpretation of the terms "entry" and "intended." Since these words no longer existed in the Act as amended by IIRIRA, it would not be inconsistent to say that *Fleuti* did not survive the enactment of IIRIRA.[181] For example, instead of using the "brief, casual, and innocent" standard, IIRIRA categorically treats any lawful permanent resident alien absent from the United States for a continuous period in excess of 180 days as an alien "seeking admission."[182] Based on these considerations, the Board reversed the Immigration Judge's decision to apply the Fleuti doctrine, and remanded the case for further proceedings consistent with the opinion.[183]

B. Richardson v. Reno

Although the result of *In re Jesus Collado* seemed to foreclose an avenue of relief previously available to returning permanent resident aliens, *Richardson v. Reno*[184] brought new hope. The district court in *Richardson* came to an opposite conclusion, holding that "[i]t is evident from the plain meaning of the statute, the legislative history, and the important policy concerns that animated the Court in 1963 that Fleuti is still good law."[185]

Richardson was a native citizen of Haiti.[186] Since 1968, he had resided in the United States as a lawful permanent resident, eventually marrying a U.S. citizen, fathering three children (all of whom were U.S. citizens) and establishing a successful cleaning business.[187] On October 26, 1997, Richardson was detained by the INS at the Miami International Airport after returning from a two day trip to Haiti with his family.[188] While detained,

180. *Id.* at *9 n.3.
181. *Id.* at *10.
182. *Id.* at *11.
183. *Id.* at *14.
184. Richardson v. Reno, 994 F.Supp. 1466, 1472 (S. D. Fl. 1998), *rev'd and vacated,* 1998 U.S. App. LEXIS 31009 (11th Cir. 1998), *opinion withdrawn and substituted by* 162 F.3d 1338 (11th Cir. 1998), *reaff'd in part,* 180 F.3d 1311 (11th Cir. 1999), *rehearing en banc denied,* 193 F.3d 525 (11th Cir. 1999), *cert. denied,* 120 S.Ct. 1529 (2000).
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 1468.

Richardson admitted to having two prior convictions.[189] On the basis of his statements, he was deemed inadmissible under INA § 212(a)(2) because "he was not 'clearly and beyond a doubt' entitled to be admitted to the United States."[190] He was held at the Krome Detention Center without opportunity for release on bond, while the INS began its procedures for removal.[191]

On November 13, 1997, Richardson requested that the INS release him on bond pending removal proceedings.[192] This request was denied, after which Richardson filed a Motion for Bond Pending Deportation Proceedings with the Office of the Immigration Judge.[193] Again, his motion was denied without a hearing.[194] At this point, Richardson filed a habeas corpus petition with the federal district court, contesting the Immigration Judge's denial of his request for a bond hearing.[195] Finding subject matter jurisdiction, the district court held that the BIA's decision was not based on a permissible construction of INA § 101(a)(13)(C).[196] On the contrary, the BIA interpretation destroyed the plain meaning of the statute.[197] The federal district court construed the statute to mandate only when a returning lawful permanent resident should not be regarded as seeking admission.[198] If one of the six categorical exceptions to INA § 101(a)(13)(C) applied, the returning lawful, permanent resident could not be regarded as "seeking admission."[199] The statute did not mandate that all other returning lawful permanent residents whose status fell outside the six categorical exceptions be deemed to be "seeking admission."[200] Rather, the court said that the Fleuti test of "brief, casual, and innocent" should still be applied to determine the returning permanent resident's status,[201] based on the fact that Congress had not expressly rejected the court-created Fleuti doctrine.[202] In rejecting the BIA decision in *In re Jesus Collado*, the federal

189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 1470.
197. *Id.* at 1470-71.
198. *Id.* at 1471.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*

district court looked to the plain meaning of the statute, legislative history, and important policy considerations. The court held that under the deportation laws, Richardson was entitled to a bond hearing before an immigration judge because he was not "seeking admission" as defined in *Fleuti*.[203] Again, the courts recognized a heightened level of protection for those aliens with a vested interest in the United States.

What seemed to be a victory for this class of unprotected individuals was quickly overshadowed by yet another challenge to their constitutional rights. This time, Congress' limitation on judicial review would have significant ramifications, not only for Richardson, but for returning permanent residents as a whole. The federal district court opinion was reversed and vacated by the Eleventh Circuit Court of Appeals on February 23, 1998 for lack of subject matter jurisdiction.[204] No longer would time spent in the United States entitle lawful permanent residents to a greater degree of protection. They were again thrown in with the other new entry seekers and left with virtually no due process rights. On rehearing, the court of appeals again declined to reach the merits of the case. Instead, the court held that IIRIRA eliminated the court's jurisdiction to hear Richardson's constitutional and statutory challenges.[205]

V. THE FUTURE RAMIFICATIONS OF IIRIRA AND THE ROLE OF THE JUDICIARY

Given the current state of uncertainty surrounding the Fleuti doctrine and Congress' limitations on courts' power to review administrative decisions, the

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203. *Id.*

204. Richardson v. Reno, 1998 U.S. App. LEXIS 31009 (11th Cir. 1998), *opinion withdrawn and substituted by* 162 F.3d 1338 (11th Cir. 1998), *"Application to Withdraw Court's Mandate and Stay or Summarily Reverse its Decision" denied,* 175 F.3d 898 (11th Cir. 1999), *vacated, case remanded for further consideration in light of Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999),* 526 U.S. 1142 (1999), *reaff'd in part,* 180 F.3d 1311 (11th Cir. 1999), *rehearing en banc denied,* 193 F.3d 525 (11th Cir. 1999), *cert. denied,* 120 S.Ct. 1529 (2000).

205. Richardson v. Reno, 162 F.3d 1338, 1357 (11th Cir. 1998), *"Application to Withdraw Court's Mandate and Stay or Summarily Reverse its Decision" denied,* 175 F.3d 898 (11th Cir. 1999), *vacated, case remanded for further consideration in light of Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999),* 526 U.S. 1142 (1999), *reaff'd in part,* 180 F.3d 1311 (11th Cir. Fla. 1999), *rehearing en banc denied,* 193 F.3d 525 (11th Cir. 1999), *cert. denied,* 120 S.Ct. 1529 (2000). For a more detailed discussion on the issues concerning judicial review raised by the case, see generally *id. See also* Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999); Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure,* 14 GEO. IMMIGR. L.J. 385 (2000).

beginning of the twenty-first century marks a turning point. The question remains, will the U.S. Supreme Court dare to disavow the longstanding plenary power doctrine, and openly recognize constitutional protections for this category of noncitizens? Or will the echo of *Yick Wo*[206] resonate throughout the next century? The unfettered exercise of congressional powers to establish immigration laws could lead to disastrous consequences. To ensure that each branch retains its independence and ability to perform essential functions, the judiciary must act to preserve its Article III function of upholding the Constitution,[207] and according to Erwin Chemerinsky, "Due process, of course, is at the very core of the judicial mission."[208] With the enactment of IIRIRA, Congress exceeded its essential powers by foreclosing all federal judicial review of immigration matters. As a result, the INS has the sole authority to determine the substantive and procedural rights of certain individuals residing in the United States.

To retain its central function, the U.S. Supreme Court should reject a strict construction of the statute and use the "clear statement" rule to retain judicial review of constitutional claims. The Court should further recognize the due process rights of returning permanent resident aliens by affirming the Fleuti doctrine, in light of the 1996 amendments, whether through subconstitutional norms or through "real" constitutional norms. The action or inaction of the federal judiciary during this juncture will be crucial to the shaping of immigration law in the twenty-first century.

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206. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that the equal protection clause protected Chinese nationals against discriminatory enforcement of a San Francisco ordinance regulating laundries). Between 1882 and 1892, Congress enacted a series of "Chinese exclusion laws" which became the first federal immigration statutes to be subjected to judicial scrutiny. ALEINEIKOFF ET AL., *supra* note 41, at 179. The origins of immigration case law are firmly rooted in the racist rhetoric surrounding Asian immigrants. For further discussion on the history of this period see LUCY E. SALYER, LAWS AS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995); *see also* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 289-99 (1984).

207. Erwin Chemerinsky, *Essay: A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. MEM. L. REV. 295, 313 (1999).

208. *Id.*